Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOEL LEVINE
16000 Ventura Boulevard
Suite 500
Encino, CA 91436
(818) 995-6052

IRA M. SALZMAN
600 South Lake Avenue
Suite 410
Pasadena, CA 91106
(818) 578-0043

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
JOHN K. BUSH
JONATHAN K. TYCKO
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
** Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED

1. Whether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly prohibited as grounds for departure is to be reviewed under the de novo standard applied by the court below or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases.

2. Whether the testimony of a witness exposed to a defendant's compelled statement is admissible under *Kastigar* v. *United States*, 406 U.S. 441 (1972), merely upon a showing that there is an independent source upon which the testimony is based, as held by the court below, or is admissible only if the prosecution also proves that the witness's testimony was not shaped or altered in any way by exposure to the defendant's compelled statement, as held by the District of Columbia Circuit in *United States* v. *North*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992).

3. Whether Fourteenth Amendment substantive due process is violated in the context of an arrest by merely "objectively unreasonable" force, as held by the court below, or only if the force is "shocking to the conscience" or "intended as punishment" and applied in a custodial setting, as held by other circuits.

4. Whether the federal prosecution of petitioner, after his acquittal by a state court on substantially identical charges, violated the Double Jeopardy Clause of the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES INVOLVED	2
STATEMENT OF THE CASE	3
A. Statement of the Facts	3
1. Rodney King's Arrest	3
2. The Investigation and First Prosecution	5
3. The Second Prosecution	7
4. Sentencing	8
B. The Decision of the Court Below	9
C. The Denial Of Rehearing By The Panel And The Court En Banc And The Opinions Of The Judges Dissenting From Denial Of Review En Banc	10
REASONS FOR GRANTING THE WRIT	12
A. There Is A Conflict Among The Circuits Regarding The Factors That Justify Departure From The Federal Sentencing Guidelines And The Appropriate Standard Of Appellate Review Of Downward Departures Under The Guidelines	12

	Page
B. The Circuits Are Divided Regarding The Admissibility Under *Kastigar* v. *United States* Of The Testimony Of A Witness Exposed To A Defendant's Compelled Statement	18
C. The Decision Below Conflicts With Decisions Of Other Circuits And Of This Court As To The Appropriate Definitions Of Unlawful Force And Custody Under The Fourteenth Amendment	22
D. In Light Of The Extraordinary Circumstances Of This Case, The Court Should Reexamine the Dual Sovereignty Doctrine And Address Whether The Successive Prosecutions Of Petitioner Violated The Double Jeopardy Clause Of The Fifth Amendment Or The Due Process Clauses Of The Fifth And Fourteenth Amendments	24
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page(s)
Abbate v. *United States*, 359 U.S. 187 (1959)	24
Ashe v. *Swenson*, 397 U.S. 436 (1970)	30
Bartkus v. *Illinois*, 359 U.S. 121 (1959)	24,26
Bell v. *Wolfish*, 441 U.S. 520 (1979)	22
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971)	27
Carlson v. *Green*, 446 U.S. 14 (1980)	27
Dewey v. *Des Moines*, 173 U.S. 193 (1899)	27
Department of Revenue of Montana v. *Kurth Ranch*, 114 S. Ct. 1937 (1994)	26
Doe v. *United States*, 487 U.S. 201 (1988)	18
Elkins v. *United States*, 364 U.S. 206 (1960)	28
Erie R.R. Co. v. *Tompkins*, 304 U.S. 64 (1938)	27
Garrity v. *New Jersey*, 385 U.S. 493 (1967)	19
Graham v. *Connor*, 490 U.S. 386 (1989)	22,23
Heath v. *Alabama*, 474 U.S. 82 (1985)	24,29
In re Grand Jury Subpoenas Dated December 7 and 8 v. *United States*, 40 F.3d 1096 (10th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 17, 1995) (No. 94-1401)	21

Cases (continued)	Page(s)
Johnson v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)	22
Kastigar v. *United States*, 406 U.S. 441 (1972)	*passim*
Koon v. *United States*, 114 S. Ct. 296 (1993)	9
Murphy v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)	19,28
People v. *Comingore*, 570 P.2d 723 (Cal. 1977)	26
Powell v. *Superior Court*, 283 Cal. Rptr. 777 (Cal. Ct. App. 1991)	4,5,6
Rinaldi v. *United States*, 434 U.S. 22 (1977)	7
Solem v. *Helm*, 463 U.S. 277 (1983)	17
Stanley v. *Illinois*, 405 U.S. 645 (1972)	26
State v. *Vallejos*, 883 P.2d 1269 (N.M. 1994)	20
Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842)	27
Turley v. *Wyrick*, 554 F.2d 840 (8th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978)	25
United States v. *Alvarez-Cardenas*, 902 F.2d 734 (9th Cir. 1990)	18
United States v. *Bartel*, 19 F.3d 1105 (6th Cir.), *cert. denied*, 115 S. Ct. 113 (1994)	20
United States v. *Canoy*, 38 F.3d 893 (7th Cir. 1994)	15

Cases (continued)	Page(s)
United States v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991)	22,23
United States v. *Diaz-Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989)	14
United States v. *Goff*, 20 F.3d 918 (8th Cir.), *cert. denied*, 115 S. Ct. 482 (1994)	16
United States v. *Grimes*, 641 F.2d 96 (3d Cir. 1981)	25
United States v. *Kaye*, 23 F.3d 50 (2d Cir. 1994)	15
United States v. *Koon*, 6 F.3d 561 (9th Cir. 1993)	9
United States v. *Lanza*, 260 U.S. 377 (1922)	24,29
United States v. *Mondello*, 927 F.2d 1463 (9th Cir. 1991)	18
United States v. *North ("North I")*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991)	9,19,20
United States v. *North* ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991)	9,20
United States v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992)	9,19,20
United States v. *Reese*, 2 F.3d 870 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994)	23
United States v. *Rivera*, 994 F.2d 942 (1st Cir. 1993)	*passim*

Cases (continued)	Page(s)
United States v. *Schmidgall*, 25 F.3d 1523 (11th Cir. 1994)	20
United States v. *Simpson*, 7 F.3d 813 (8th Cir. 1993)	16
United States v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989)	17
Virginia Bankshares, Inc. v. *Sandberg*, 111 S. Ct. 2749 (1991)	26
Vance v. *Terrazas*, 444 U.S. 252 (1980)	27
Williams v. *United States*, 112 S. Ct. 1112 (1992)	17
Constitutional Provisions, Statutes and Sentencing Guidelines	
U.S. Const. Amend. IV	*passim*
U.S. Const. Amend. V	*passim*
U.S. Const. Amend VI	2,29,30
U.S. Const. Amend. XIV	*passim*
18 U.S.C. § 242	2,22
18 U.S.C. § 3553	2,14
18 U.S.C. § 3742(f)	16
28 U.S.C. § 1254(1)	2
28 U.S.C. §§ 3551, *et seq.*	12
U.S.S.G. § 2A2.2	2

Constitutional Provisions, Statutes and Sentencing Guidelines (continued) — **Page(s)**

U.S.S.G. § 2H1.1 2

U.S.S.G. § 2H1.4 2,9,16

U.S.S.G. § 5K2.0, p.s. 2

U.S.S.G. § 5K2.10, p.s. 2,15,16

Cal. Const., art. I, § 15 26

Cal. Penal Code §§ 656, 793-794 (West 1988) 26

Other Authorities

Ronald J. Allen, *Freedom from Double Jeopardy, Our Lost Liberty*, WALL ST. J., Mar. 17, 1993, at A15 ... 24

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995) ..... *passim*

Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM.J. CRIM. L. 1 (1992) 25

Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1 7

Briseno's Attorney Looks Back At Trial, NAT'L L.J., May 17, 1993, at 15 8

Other Authorities (continued) — **Page(s)**

Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic View of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994) 24,28

Gregory J. Church, *Cries of Relief*, TIME, Apr. 26, 1993, at 18 7

Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992) 25

Walter L. Fisher, *Double Jeopardy, Two Sovereignties and The Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961) 25

J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956) 28

J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932) 25

Harlan H. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963) 25

Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994) ..... *passim*

Paul Hoffman, *Double Jeopardy Wars: The Case For a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994) 24

Other Authorities (continued) **Page(s)**

Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1 7

James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979) 25

Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In The Wake of Garcia* v. *San Antonio Metropolitan Transit Authority*, 22 NEW. ENG. L. REV. 31 (1987) 25

Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986) 25

Jack Nelson, *Bush Denounces Rioting in L.A. as "Purely Criminal,"* L.A. TIMES, May 1, 1992, at A9 7

Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961) 25

Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982) 25

Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967) 25

Other Authorities (continued) **Page(s)**

George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus* v. *Illinois and Abbate* v. *United States*, 14 CASE W. RES. L. REV. 700 (1963) 25

Paul Craig Roberts, *Justice Takes A Double Jeopardy Hit*, WASH. TIMES, May 3, 1993, at 3 24

Richard A. Serrano & Henry Weinstein, *After the Riots: The Search for Answers*, L.A. TIMES, May 7, 1992, at A3 7

Stuart Taylor, Jr., *Repeat Offenses*, AM. LAWYER, Sept. 9, 1992, at 8 24

Bruce A. Terris, *Corruption of Justice in L.A.*, LEGAL TIMES, Apr. 26, 1993, at 22 24

Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, L.A. TIMES, Mar. 7, 1991, at A1 5

PETITION FOR WRIT OF CERTIORARI

Stacey C. Koon respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.[1]

Petitioner Stacey C. Koon was a Los Angeles Police Department ("LAPD") sergeant present during the arrest of Rodney Glen King. A videotape of a portion of the arrest was repeatedly broadcast on television news programs worldwide, producing "horror and outrage" throughout the world. Within hours of the first broadcast, state and federal officials began working closely together to determine whether to prosecute petitioner for failing to prevent the alleged excessive use of force during the arrest. Federal prosecutors refrained from bringing a prosecution, and petitioner was indicted by state prosecutors. Sergeant Koon was acquitted of all charges. His acquittal precipitated days of massive, destructive rioting in Los Angeles, resulting in fifty-three deaths, injury to hundreds, and property damage of over $1 billion. The federal government then brought a second criminal prosecution and Sergeant Koon was convicted.

Petitioner's sentence of thirty months in prison was appealed by federal prosecutors. The court of appeals affirmed petitioner's conviction but vacated his sentence and ordered him to be resentenced.

Petitioner's prosecution and sentencing present genuinely extraordinary circumstances implicating fundamental issues of due process, double jeopardy and fairness. Moreover, as recognized by nine judges of the court of appeals dissenting from the denial of rehearing en banc, the decision below directly conflicts with *United States* v. *Rivera*, 994 F.2d 942 (1st Cir.

---

[1] In the proceeding before the court of appeals, the parties were petitioner and Laurence M. Powell, who were defendants-appellants and cross-appellees, and respondent, which was plaintiff-appellee and cross-appellant.

1993) (Breyer, J.), and other cases on important and recurring issues arising when a district court departs from a prescribed sentencing range under the United States Sentencing Guidelines. This case also raises a substantial issue, on which the lower courts are divided, regarding the requirements under *Kastigar* v. *United States*, 406 U.S. 441 (1972), for the admissibility of the testimony of a witness who has been exposed to the defendant's compelled statement.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 34 F.3d 1416 and reprinted at App. 1a-79a. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc and the opinions of the nine judges dissenting therefrom are reported at 45 F.3d 1303 and reprinted at App. 80a-93a. The sentencing opinion of the district court is reported at 833 F. Supp. 769 and reprinted at App. 94a-138a. Excerpts from the district court's unreported order denying petitioner's motion for judgment of acquittal and new trial are reprinted at App. 139a-144a. Excerpts from the district court's unreported orders addressing the *Kastigar* issue are reprinted at App. 145a-164a.

JURISDICTION

The court of appeals issued its opinion on August 19, 1994. On January 12, 1995, the court of appeals denied the petition for rehearing and suggestion for rehearing en banc. This petition is being submitted within the time permitted by the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES INVOLVED

This case involves the Fourth Amendment to the Constitution, the Double Jeopardy and Self-Incrimination Clauses of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, 18 U.S.C. §§ 242, 3553, and U.S.S.G. §§ 2A2.2, 2H1.1, 2H1.4, 5K2.0, p.s., 5K2.10, p.s., which are set out verbatim at App. 165a-175a.

STATEMENT OF THE CASE

A. Statement of the Facts

1. Rodney King's Arrest

On the evening of March 2, 1991, Rodney Glen King spent several hours drinking malt liquor with two male friends in his wife's parked Hyundai automobile in a suburb of Los Angeles.[2] App. 2a, 96a-97a. They then proceeded to go for a ride, with Mr. King driving. App. 2a, 97a.

Mr. King was intoxicated and speeding along the 210 Freeway towards the San Fernando Valley when California Highway Patrol ("CHP") Officers Melanie Singer and Tim Singer observed Mr. King's vehicle and began pursuit in their CHP cruiser with its red lights flashing and siren activated. App. 2a, 97a. Mr. King's vehicle was traveling in excess of 100 m.p.h. App. 110a.

Mr. King refused to pull his vehicle over, and continued speeding off the freeway and onto surface streets, driving in an erratic fashion. App. 97a-98a. The CHP officers called for assistance, and LAPD Officers Laurence M. Powell and Timothy E. Wind, along with patrol officers from the Los Angeles Unified School District, responded and joined in pursuit of Mr. King's vehicle. App. 2a, 97a. During the chase, the CHP officers ordered Mr. King by loud speaker to pull over, but he refused to do so. App. 97a.

After an eight-mile chase, Mr. King's vehicle was forced to a stop at a blockaded entrance to the Hanson Dam recreation area. App. 2a, 98a. Officer Melanie Singer ordered the occupants of the Hyundai out of the vehicle. App. 98a. Mr. King's companions followed these instructions and were taken into custody without incident. *Id.* Mr. King initially ignored Officer Singer's repeated orders to exit the vehicle. When he eventually emerged, he "persistently failed to comply with police

---

2 "[I]t is certain that Mr. King consumed more than 80 ounces." App. 97a.

commands," App. 122a, to lie on the ground as ordered. App. 2a, 98a.

At this point Sergeant Koon arrived, joined moments later by LAPD Officers Theodore J. Briseno and Rolando Solano. App. 2a, 98a. Officer Melanie Singer unholstered her service revolver and pointed it at Mr. King, an unidentified and "still unsearched felony suspect," App. 122a, and attempted, without success, to get him to lie on the ground with his hands visible. App. 98a.

Sergeant Koon commanded Officer Singer to put away her gun, and the LAPD officers ordered Mr. King to lie in a prone position, but he continued to refuse. Officers Powell, Wind, Briseno, and Solano then jointly attempted to force Mr. King into a prone position. App. 2a, 98a. But Mr. King, who was "a large, muscular man" and, "[a]t 6'3" and approximately 225 lbs.," "appreciably larger than both Koon and Powell," App. 98a, 122a, "resisted and became combative," throwing all four officers off of him and "forcing [them] . . . to retreat." App. 98a; *see* App. 2a.

The district court concluded that it was "reasonabl[e]" for Sergeant Koon to "have suspected" at this point "that Mr. King was under the influence of PCP," because of his profuse sweating and his "erratic and recalcitrant behavior." App. 101a. Sergeant Koon fired two taser darts into Mr. King in an attempt to subdue him, to no avail, reinforcing the impression that Mr. King had ingested PCP. App. 2a, 101a. Mr. King then tried to escape, rising rapidly to his feet and charging Officer Powell, who knocked him to the ground with his baton. He continued to attempt to rise and was struck by Officers Powell and Wind. App. 101a.

The latter portion of the arrest was recorded on videotape by a bystander. App. 2a, 98a-99a. The videotape "was shown over and over and over again," *Powell* v. *Superior Court*, 283 Cal. Rptr. 777, 780 (Cal. Ct. App. 1991), "'from Paris to Tokyo,'" producing "'horror and outrage throughout this world,'" as federal prosecutors would later remind the jury, *see* App. 44a (quoting closing argument). The videotape "creat[ed] a vivid

impression of a violent encounter." App. 99a. Its showing "caused shock, revulsion, outrage and disbelief. . . . A fire storm immediately developed in the Los Angeles area, so intense and pervasive was the reaction." *Powell*, 283 Cal. Rptr. at 779. However, as the district court found, "careful analysis shows that [the videotape was] . . . sometimes an ambiguous record of the crucial events." App. 99a. The court of appeals concurred. App. 79a. Even federal prosecutors "agreed that much of the officers' conduct was justified and legal." App. 99a.[3]

2. The Investigation and First Prosecution

State prosecutors indicted Sergeant Koon and Officers Powell, Wind and Briseno on assault and related charges based on allegations that excessive force was used during the arrest. App. 4a. Federal officials worked closely with state officials throughout the state prosecution. Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, L.A. TIMES, Mar. 7, 1991, at A1. Indeed, federal investigators had begun their work just two days after Mr. King's arrest and only hours after the videotape was first broadcast on television. *Id.*

On the day the state indictment was issued, and again on March 18, 1991, Sergeant Koon met with representatives of the LAPD Internal Affairs Division ("IAD"). App. 147a. Although

---

3 Approximately the first minute of the videotape records Mr. King's resistance to arrest, his attempt to escape and Officers Powell's and Wind's response. App. 3a, 101a. The district court found that the officers' actions during this period did not rise "to the level of criminal deprivation of Mr. King's rights." App. 102a. At one minute and five seconds into the videotape, Officer Briseno kicked Mr. King with a "sudden movement" that Sergeant Koon "could not have anticipated." App. 106a; *see also* App. 3a, 102a. Following this, during a period of approximately nineteen seconds, Officers Powell and Wind applied physical force that the district court found "crossed the line into criminal illegality." App. 107a; *see also* App. 3, 102a. At approximately one minute and thirty seconds, Officer Powell gave his handcuffs to Officer Briseno, and twelve seconds later, Mr. King was cuffed. App. 102a. A few seconds later, the arrest was completed. *Id.* The district court found Sergeant Koon criminally liable for the nineteen seconds of "illegal behavior" by Officers Powell and Wind. (Officer Wind was acquitted.)

Sergeant Koon initially declined to answer questions, an interviewer informed him that his failure to answer questions could result in discipline and discharge from the police force. App. 16a, 148a. The investigator advised Sergeant Koon that any statement made under compulsion of the threat of such discipline "could not be used against . . . [him] in a subsequent criminal proceeding." App. 148a. Relying on these assurances, Sergeant Koon "agreed to answer questions, and was interviewed extensively by IAD officers." *Id.* A transcript was made of the interview and supplied to Officer Briseno. App. 156a. "Briseno read the IAD statement[], or summaries thereof, before he testified at the state court proceedings." App. 156a-157a.

The state case was initially assigned for trial in Los Angeles, but the California Court of Appeal determined that the "massive local media coverage" had been "[s]o extensive and pervasive" and the "political fallout" "so intense" that "potential jurors [had] been infected to the extent there [was] a reasonable likelihood that a fair and impartial trial [could not] be had in Los Angeles County." *Powell*, 283 Cal. Rptr. at 780.[4] The case was therefore moved to Simi Valley, California for trial. App. 4a. Sergeant Koon's defense during the trial was "that the force used during the arrest of King was justified and was not excessive." *Id.*

On April 29, 1992, Sergeant Koon was acquitted on all charges. *Id.* His co-defendants were also acquitted of all charges, with the exception of an assault charge against Officer Powell, on which the jury was unable to return a verdict. *Id.*

The verdicts touched off four days of the widespread uncontrollable rioting and looting in Los Angeles and other

---

[4] Publicity, emotions and the political furor surrounding the Rodney King arrest were so intense that the police chief's status was a "matter of continuing and acrimonious debate," *Powell*, 283 Cal. Rptr. at 786, the publicity eclipsed that connected with heinous crimes such as those involving Charles Manson and the "Hillside Strangler," *id.* at 785, the state appellate court received "a threat of community violence," *id.* at 787, and the "goal of a fair trial in the locality of the crime [was] practically unattainable," *id.*

cities. *See generally* Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1. The level and extent of civil disorder during those days were among the worst in California's and, indeed, the Nation's history. Fifty-three persons were killed, hundreds were injured, and more than $1 billion in property, including over 5,000 buildings, were destroyed. George J. Church, *Cries of Relief*, TIME, Apr. 26, 1993, at 18; Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1.

3. The Second Prosecution

After the riot, there were widespread calls from political and community leaders for federal prosecution of petitioner and his co-defendants to quell the anger in Los Angeles over the state court verdicts. Jack Nelson, *Bush Denounces Rioting in L.A. as "Purely Criminal,"* L.A. TIMES, May 1, 1992, at A9. Although the customary practice of the Department of Justice is not to prosecute an individual who has already been prosecuted under state law "for the same act or acts," except under "compelling" circumstances, *see Rinaldi* v. *United States*, 434 U.S. 22, 24-31 (1977), federal prosecutors obtained an indictment against Sergeant Koon and his co-defendants on August 4, 1992, on charges of violating 18 U.S.C. § 242. App. 4a, 162a-164a. Although the elements of this offense were not completely identical to those of the state charges, "[t]he operative facts and legal issues in the state and federal trials were substantially similar." App. 8a. The district court rejected petitioner's motion to hold an evidentiary hearing to determine whether the federal prosecution of Sergeant Koon after his acquittal in state court violated the Double Jeopardy Clause. App. 30a.

The federal trial commenced on February 25, 1993, in the center of Los Angeles County, only blocks away from buildings destroyed in the rioting and looting. App. 4a. Federal prosecutors utilized state investigative reports and evidence from the state trial. App. 35a; Richard A. Serrano & Henry Weinstein, *After the Riots: The Search for Answers*, L.A. TIMES, May 7, 1992, at A3.

Over objections based upon *Kastigar* v. *United States*, 406 U.S. 441 (1972), and the Confrontation Clause of the Constitution, the district court permitted prosecutors to offer into evidence the "highly damaging" (App. 4a) videotaped state trial testimony of Officer Briseno, who had read Sergeant Koon's IAD statement, and who refused to testify during the second trial. App. 20a.

The federal jury returned its verdict on April 17, 1993. App. 4a. Los Angeles police along with 600 National Guardsmen and United States Marines stood by in the event of another acquittal-inspired riot. Church, *supra*, at 18. But the federal jury returned guilty verdicts against Sergeant Koon and Officer Powell and the rioting never occurred. "'[T]he entire city just calmed down from a very nervous . . . a dangerous precipice.'" *Briseno's Attorney Looks Back At Trial*, NAT'L L.J., May 17, 1993, at 15 (quoting Officer Briseno's counsel).

4. Sentencing

On August 4, 1993, Sergeant Koon was sentenced to a term of thirty months in prison and two years supervised release. App. 4a. The district court imposed this sentence after finding that Sergeant Koon was criminally liable because he failed to prevent the unlawful application of force against Mr. King by Officers Powell and Wind during a period of approximately nineteen seconds after an unanticipated kick administered by Officer Briseno. App. 107a.

Notwithstanding that petitioner had been acquitted of assault charges in the state trial, the district court began its sentencing calculations by agreeing with the government that "the appropriate underlying offense" under the Sentencing Guidelines was "aggravated assault," which has a base offense level of 15. App. 112a. The district court increased the base by 4 levels because a "dangerous weapon," a baton, was used and by 2 levels because the victim sustained "bodily injury," App. 112a-113a, *i.e.*, "contusions, perhaps abrasions," App. 105a. Thus, the offense level applicable to the underlying "aggravated assault offense" was 21. App. 115a. The district court added that offense level to 6 to obtain a final base offense level of 27 under

U.S.S.G. § 2H1.4. App. 115a, 118a. This base offense level, combined with petitioner's Criminal History Category I, resulted in a prescribed sentencing range of 70 to 87 months. App. 118a.

Next, the district court concluded that a five-level departure downward from the prescribed range was warranted because "Mr. King's wrongful conduct contributed significantly to provoking the offense behavior." App. 119a. An additional three-level departure was deemed appropriate because of a combination of several "atypical" aspects of the case, including that (1) Sergeant Koon was "unusually susceptible to prison abuse" because of "[t]he extraordinary notoriety and national media coverage of this case, coupled with . . . [his] status as [a] police officer;" (2) he would "be subjected to multiple adversarial proceedings and stripped of . . . [his] position and tenure by the LAPD;" (3) "there is no evidence, and the government does not argue, that . . . [he is] dangerous or likely to commit crimes in the future;" and (4) "a specter of unfairness" was raised by the indictment and trial of Sergeant Koon "only after a state court jury acquitted . . . [him] of charges based on the same underlying conduct." App. 119a-120a. These departures resulted in a sentencing range of 30 to 37 months. App. 134a-135a. Petitioner was sentenced to 30 months. App. 4a.

Petitioner entered prison on October 12, 1993, after his applications for bail pending appeal were denied. *See Koon* v. *United States*, 114 S. Ct. 296 (1993) (mem.); *United States* v. *Koon*, 6 F.3d 561 (9th Cir. 1993).

B. The Decision of the Court Below

The United States Court of Appeals for the Ninth Circuit affirmed Mr. Koon's conviction. It rejected petitioner's argument that Officer Briseno's testimony should have been excluded under *Kastigar*, App. 14a-20a, expressly rejecting the "more protective" *Kastigar* standard applied by the District of Columbia Circuit in *United States* v. *North* ("*North I*"), 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992). The court also rejected Mr. Koon's claim that

he was entitled to an evidentiary hearing concerning his double jeopardy and due process contentions.

The court of appeals reversed the district court's decision concerning sentencing. It held that the three-level departure based upon additional punishment, absence of a need to protect the public, and successive state and federal prosecutions was impermissible under the Guidelines because, as the court below explained, consideration of any of those factors "as part of the decision to depart" is not "consistent with the structure and purposes of the Guidelines and the federal sentencing statutes." App. 59a. The court of appeals also rejected the five-level departure based upon victim misconduct. App. 70a-76a. While it accepted the district court's findings of "King's misconduct"—"speeding, driving while intoxicated, fleeing in his car from pursuing officers, refusing to obey the officers' commands to get on the ground and remain prone, attempting to escape from police custody, charging Powell," App. 70a—the court determined that no departure was warranted on these grounds because "King's provocative behavior had subsided before appellants committed the offense conduct." App. 71a.

C. The Denial Of Rehearing By The Panel And The Court En Banc And The Opinions Of The Judges Dissenting From Denial Of Review En Banc

The court of appeals denied Mr. Koon's petition for rehearing and suggestion for rehearing en banc. App. 80a-81a. Nine or more of the judges dissented from that order. App. 81a-93a.[5]

---

[5] Judges Pregerson, Wiggins, Kozinski, Noonan, and Hawkins joined in all of Judge Reinhardt's dissenting opinion, including Part IV, in which he objected to the Ninth Circuit's policy of not disclosing the number of judges who vote for rehearing en banc, and implied that the number of judges voting for rehearing en banc may be greater than those who join in an opinion dissenting from denial of en banc review. App. 81a-93a. Judge O'Scannlain, joined by Judges T.G. Nelson and Kleinfeld, filed a separate opinion concurring in all of Judge Reinhardt's dissent except for Part IV. App. 93a.

The dissenters argued that "the panel seriously erred in vacating the downward departures ordered by Judge Davies." App. 81a. They concluded that "[t]he panel's unduly restrictive approach to Guidelines sentencing" was "both internally inconsistent and in direct conflict with . . . [the Ninth Circuit's] prior holdings." App. 82a.

The dissenters criticized the panel's rejection of the district court's three-level departure, explaining that none of the factors relied upon by the district court "was a *prohibited* factor" for departure under the Guidelines. App. 84a. The panel had simply "created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure." *Id.*

The dissent also disagreed with the panel's rejection of the district court's five-point departure based upon victim misconduct. App. 87a-88a. The panel had refused to permit a departure on that basis because "an act provokes only if it precipitates an immediate response." App. 88a. The dissenters criticized the panel for refusing to recognize that volatility of an arrest could ever be a permissible ground for departure in an excessive force case, "although it can point to no guideline language that would support such an absolutist view." App. 87a-88a.

The dissenting judges stressed that the panel opinion exacerbated "two contradictory general approaches to downward departures" in cases from the Ninth Circuit and elsewhere. App. 88a. In particular, the "panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion [in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993),] authored by then-Chief Judge Breyer, a leading member of the initial Sentencing Commission." App. 89a-90a:

> *Rivera* . . . permit[s] departures for personal or professional consequences of conviction that are unusual. [994 F.2d] at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a

> district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will "*not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original).

App. 90a.

The dissent concluded that "*Rivera* is squarely at odds with the inflexible and far stricter approach adopted . . . in this case," *id.*, and that district judges would have no "choice but to pick and choose among our various irreconcilable statements." App. 82a. They added that because the issue is important and would arise frequently, "perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines." App. 90a.

REASONS FOR GRANTING THE WRIT

A. There Is A Conflict Among The Circuits Regarding The Factors That Justify Departure From The Federal Sentencing Guidelines And The Appropriate Standard Of Appellate Review Of Downward Departures Under The Guidelines.

As the nine dissenting judges explained below, the panel decision is in direct conflict with decisions in other circuits concerning the appropriate factors to be considered by a district court in determining whether to depart from the Sentencing Guidelines, as well as the standard for appellate review of such decisions. The decision below directly conflicts, for example, with *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). This conflict involves extremely significant issues of institutional competence under the Sentencing Reform Act of 1984, 28

U.S.C. §§ 3551, *et seq.*, and the Sentencing Guidelines promulgated thereunder.

In *Rivera*, the First Circuit elaborated at length on the responsibilities under the Guidelines of three different institutions: the Sentencing Commission, the district courts, and the courts of appeals. 944 F.2d at 945-52. As explained by *Rivera*, the courts of appeals play a limited role. A district court is expected generally to follow the Guidelines. However, in cases that are "not ordinary," a district court may depart from the Guidelines if it explains the reasons for its departure. *Id.* at 946. The court of appeals then reviews the departure decision only for "reasonableness." *Id.* This methodology affords the Commission the flexibility necessary for it to perform its statutory role:

> [T]he commission itself would collect and study both the district courts' departure determinations and the courts of appeals' decisions, thereby learning about the Guidelines' actual workings and using that knowledge to help revise or clarify the Guidelines for the future.

Id.

Rivera explained how its general analysis applied to specific categories of departure decisions. A district court is first to determine whether a particular case is a "heartland case" or an "unusual case." *Id.* at 947. If "unusual," the district court is to determine whether the particular factors that make it "unusual" would lead to an "encouraged" departure under Part 5K of the Guidelines, a "discouraged" departure under Part 5H of the Guidelines, or a "forbidden" departure under various provisions of the Guidelines. *Id.* at 947-949. In the first instance, a departure decision would be presumptively reasonable. *Id.* at 948. In "discouraged" departure situations, the district court would not depart unless the departure factor were present in an unusual kind or degree. *Id.* The district court would not depart in "forbidden" departure situations. *Id.* at 949.

Under *Rivera*, if a sentencing factor does not fall into the "encouraged," "discouraged," or "forbidden" categories, then a district court must make a "judgment about what is appropriate,"

based upon the structure and theory of the Guidelines, as well as the relevant factors identified in 18 U.S.C. § 3553, including the "nature and circumstances of the offense," the "history and characteristics of the defendant," and various general purposes of sentencing, namely, just punishment, deterrence, incapacitation and rehabilitation.

Rivera also established standards of review for various district court determinations. Findings of fact relied upon by the district court in departure decisions are reviewed for "clear error." *Id.* at 950. If a district court departs based on a "forbidden" departure factor, or in the case of an unexplained "discouraged" departure, the district court decision is accorded no deference, and is presumably reversed. *Id.* at 951. Nor is deference to be accorded to the district court's delineation of the "heartland" of a particular guideline if that delineation involves the "quintessentially legal function" of engaging in textual analysis of the words of the guideline. *Id.*

In all other situations, the district court's decision is to be accorded deference, and is to be reviewed with "full awareness of, and respect for" the district court's "superior 'feel' for the case." *Id.* at 950 (quoting *United States* v. *Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989)). A district court's decision would be entitled to deference under *Rivera* if the circumstances of a particular case are of a "kind" or "degree" that render the case "unusual" (i.e., not within the "heartland"), provided the decision does not involve a "quintessentially legal" textual analysis of the words of a guideline. *Id.* at 951. *Rivera* explained that:

> A district court may well have a special competence in making this kind of determination, because it may have a better "feel" for the unique circumstances of the particular case before it. A district court is also likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only a comparatively few cases that counsel believe present a colorable appeal.

Id. (emphasis in original).

Failing to defer to the areas of special competence of district courts:

> would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place.

Id.

The decision below conflicts directly with *Rivera*. The court below perceived only two standards of review as applicable to its consideration of the sentencing issues: "we review de novo whether the district court had authority to depart," and "we review the factual findings concerning serious bodily injury for clear error." App. 57a. Thus, its review of the district court's downward departures was plenary. Yet, none of the factors considered by the district court were "forbidden" or "discouraged" factors; indeed, as discussed *infra*, the district court's departure for victim misconduct is specifically "*encouraged*" by the Guidelines. U.S.S.G. § 5K2.10, p.s. (emphasis added). Nor did the district court's determinations involve the "quintessentially legal" function of textual analysis of the words of a particular guideline. Therefore, under *Rivera*, the departures would have been entitled to deference. Thus, *Rivera* and the case below are squarely inconsistent.

The decision below is also at odds with other circuits that have followed the *Rivera* standard. *See, e.g., United States* v. *Canoy*, 38 F.3d 893, 908 (7th Cir. 1994) ("when a district court clearly explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal") (citing *Rivera*); *cf. United States* v. *Kaye*, 23 F.3d 50, 52-53 (2d Cir. 1994) (noting that First Circuit "has adopted a standard of review requiring greater deference" to district court departure decisions but declining to reconsider

Second Circuit's *de novo* standard "[b]ecause even our strict *de novo* review supports the District Court's departure").[6]

The court of appeals' reversal of the district court's five-level downward departure based upon Mr. King's unlawful and provocative conduct is irreconcilable with *Rivera*. Such behavior by a victim is an "encouraged" basis for downward departure pursuant to § 5K2.10, p.s. Under *Rivera*, a departure based upon factors listed in Part 5K of the Guidelines is entitled to deference. *See Rivera*, 994 F.2d at 948. Indeed, "[a] sentencing court facing such non-heartland circumstances can feel confident, because of this encouragement, that a departure would not be 'unreasonable.'" *Id.* (quoting 18 U.S.C. § 3742(f)).

Contrary to the *Rivera* approach, the Ninth Circuit reviewed the departure decision de novo and concluded not only that victim misconduct did not justify departure in this case, but concluded *as a general rule* that this factor, regardless of "kind" or "degree," can never justify downward departure from the guideline range dictated by § 2H1.4. App. 75a-76a.[7] Thus, the court of appeals transformed what would have been a presumptively valid departure under *Rivera* and § 5K2.10 into a departure that would hardly ever be allowed.

---

[6] The Eighth Circuit has conflicting precedent regarding whether the *Rivera* standard applies. *Compare United States* v. *Simpson*, 7 F.3d 813, 820 (8th Cir. 1993) (noting that *Rivera* is "an excellent analysis of the statute and guidelines governing the district court's power to impose a departure from the Guidelines sentence and the appellate court's proper function on review") *with United States* v. *Goff*, 20 F.3d 918, 920 n.1 (8th Cir.) (In *Rivera*, "the First Circuit modified . . . [the appellate review] standard to give greater deference 'to sentencing court determinations of whether (and the extent to which) given circumstances make a case "unusual" or "not ordinary." ' This circuit has not adopted that modification. . . . The author of this opinion agrees with the *Rivera* modification . . . ."), *cert. denied*, 115 S. Ct. 482 (1994).

[7] The court below indicated that departure for victim misconduct in an excessive force case would be appropriate only in extremely limited circumstances such as when "the victim kills or wounds an officer's partner in his presence," thereby causing the officer to be "seized by passion, and [to] act[] in the heat of the moment." App. 76a n.38.

The decision below concerning victim misconduct is also inconsistent with the approach of other circuits. For example, in *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989), the Eighth Circuit affirmed a district court's eight-level downward departure because of the victim's provocative conduct. The Eighth Circuit rejected the government's arguments to overturn the district court's decision as "border[ing] on the frivolous," *id.* at 653, and observed that "[t]he highly situation-specific nature of the Guidelines factors suggests that appellate courts should accord great deference to ensuing district court determinations—both with respect to the threshold decision to impose a sentence below the Guidelines in the first instance, as well as to the district court's determination of the extent of departure warranted." *Id.* at 654-55 (citation omitted).

The analysis below of the three-level departure is also in conflict with the standard of review applied in *Rivera*. The district court's decision to depart downward by three levels was based upon its finding that the circumstances of the particular case were of a "kind" or "degree" that rendered the case "unusual." None of the factors underlying the three-level departure is a "forbidden" or "discouraged" basis for departure, and the determination whether to depart based upon these factors did not involve a "'quintessentially legal' function." *Rivera*, 994 F.2d at 951. Therefore, under *Rivera*, such a decision would have been reviewed with full awareness of, and respect for, the district court's superior "feel" for the case. Instead, the Ninth Circuit engaged in plenary review, and created a new set of "forbidden" factors.

This Court recently stated that "[a]lthough the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams* v. *United States*, 112 S. Ct. 1112, 1121 (1992). Accordingly, "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Id.* (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)). The *Rivera* standard of

deference to district court departure decisions is consistent with this principle. The de novo standard applied by the court below is not.[8]

The problems for district courts presented by the intercircuit conflict on the standard of appellate review for downward departures are serious indeed and should be addressed by this Court.

B. The Circuits Are Divided Regarding The Admissibility Under *Kastigar* v. *United States* Of The Testimony Of A Witness Exposed To A Defendant's Compelled Statement.

The Self-Incrimination Clause of the Fifth Amendment excludes from evidence not only the accused's coerced statement, but also *all* other evidence "derived directly and indirectly" from that statement. *See Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). Indeed, the Fifth Amendment "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Id.*[9] Accordingly, once the defendant establishes

---

[8] Moreover, as the dissenters below emphasized, the decision below does little to clarify—and, indeed, further confuses—the law regarding whether "personal and professional consequences" of a conviction can be appropriate grounds for departures. The panel appeared to join both sides of that issue. The panel had first stated that such factors "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors," App. 62a—a proposition "consistent with" *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990), but which "conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991)," App. 85a (Reinhardt, J., dissenting from denial of *en banc* review), as well as *Rivera*, App. 90a. The panel later stated "that it does 'not intend to imply that factors that do not speak to' the nature of an offense or culpability 'are *never* relevant.'" App. 85a (quoting the panel's opinion at App. 61a n.33).

[9] Although *Kastigar* involved testimony that was compelled under the federal use immunity statute, this Court has held "that the immunity provided by the statute [in *Kastigar*] is coextensive with the Fifth Amendment privilege." *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988); *see Kastigar*, 406 U.S. at 453. Thus, the principles of *Kastigar* apply not only to immunized testimony, but also to any other type of compelled or coerced statements, including (as in the present case) statements made by public employees "under threat of removal from office" after "invok[ing] their Fifth

[Footnote continued on next page]

that his statement was "compelled" within the meaning of the Fifth Amendment, a "heavy burden" is placed on the government to "prov[e] that all of the evidence it proposes to use was derived from legitimate independent sources" and not from the compelled statement itself. *Id.* at 461-62; *see also Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 n.79 (1964).

Although the general teaching of *Kastigar* is well-established, federal appellate courts have divided sharply over the specific requirements that the government must meet in order to rely on testimony from a witness who has been exposed to the defendant's coerced statement. The Ninth Circuit rule, as articulated by the court below, is that the prosecution must demonstrate simply that "the substance of the exposed witness's testimony is based on a legitimate source that is independent of the . . . [compelled] testimony," and need not address the extent to which the testimony may have been affected by the witness's exposure to the compelled statement. App. 18a-19a. As the court below acknowledged, however, (*see* App. 17a-19a) that approach is squarely at odds with the standard adopted by the District of Columbia Circuit in *United States* v. *North* ("*North I*"), 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992). In those cases, the court held that the prosecutor satisfies its *Kastigar* burden not only by proving (as in the Ninth Circuit) "that there is an independent source for all matters on which the witness testifies," App. 17a-18a (citing *Poindexter*, 951 F.2d at 373), but also (unlike in the Ninth Circuit) "that any witness exposed to compelled statements has not shaped or altered her testimony in any way, either directly or indirectly, as a result of that exposure," *id.* at 18a (citing *Poindexter*, 951 F.2d at 373; *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860-63, 872-73).

[Footnote continued from previous page]

Amendment rights." App. 15a; *see Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

To satisfy the District of Columbia Circuit standard, the prosecution must demonstrate either that the witness's testimony was "canned" prior to the witness's exposure to the compelled statement or offer equally compelling proof that the testimony was not affected in any way by this exposure. *See North II*, 920 F.2d at 942-43. The court below explicitly recognized that this showing is not required in the Ninth Circuit and noted the conflict between the Ninth and District of Columbia Circuits on this point: "[*North* and *Poindexter*] are not the law of this circuit. . . . We decline to adopt the D.C. Circuit's more protective standard." App. 18a, 19a n.13.

The conflict in the lower courts over the *Kastigar* requirements is not limited to the Ninth and District of Columbia Circuits. For example, the Sixth Circuit has adopted a standard similar to the Ninth Circuit rule. *See United States* v. *Bartel*, 19 F.3d 1105, 1112 (6th Cir.) ("'In order to meet the burden of proof under *Kastigar*, the government must establish by a preponderance of the evidence that the evidence used against the defendant was obtained from a legitimate, independent source.'") (citation omitted), *cert. denied*, 115 S. Ct. 113 (1994). The Eleventh Circuit and New Mexico Supreme Court, by contrast, have followed the approach of the District of Columbia Circuit. *See United States* v. *Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994) ("The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped—directly or indirectly—by immunized testimony, regardless of how or by whom the witness was exposed to that testimony. Prohibited indirect derivation includes using immunized testimony to help shape the questioning of another witness.") (citing *North II*, 920 F.2d at 942; *Kastigar*, 406 U.S. at 460); *State* v. *Vallejos*, 883 P.2d 1269, 1276 (N.M. 1994) ("A prohibited use of immunized testimony 'occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way "shaped, altered, or affected," by such exposure.'") (quoting *Poindexter*, 951 F.2d at 373 (quoting *North I*, 910 F.2d at 863)).

The importance of this Court's resolution of the conflict among the courts of appeals is obvious. The lower courts are

routinely called upon to hold *Kastigar* hearings to evaluate the admissibility of evidence. *See, e.g., In re Grand Jury Subpoenas Dated December 7 and 8* v. *United States*, 40 F.3d 1096, 1101 n.4 (10th Cir. 1994) ("[I]t has become common for the district court to hold a '*Kastigar* hearing'. . . ."') (citing cases), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 17, 1995) (No. 94-1401). Guidance from this Court is thus needed in this oft-litigated area.

Resolution of the *Kastigar* issue is of vital significance to the present case. Petitioner and Officer Powell "gave compelled statements to the LAPD Internal Affairs Division" after being "warned that they could lose their jobs if they refused to make statements." App. 14a-15a. It is undisputed that Officer Briseno—who gave testimony that, in the words of the court below, was "highly damaging to" petitioner, App. 4a—received a copy of petitioner's compelled statement before testifying. App. 20a n.14. At the *Kastigar* hearing, Officer Briseno "exercised his Fifth Amendment right and declined to testify regarding his ability during the state trial to segregate the effects of his exposure to . . . [Sergeant Koon's compelled] statements." App. 158a. Yet, the district court nevertheless admitted Officer Briseno's testimony into evidence based simply upon an annotated transcript that purportedly established "independent sources" for the testimony, but which did not address whether the testimony had been shaped or altered by Officer Briseno's exposure to the compelled statement. App. 157a.[10]

---

[10] Petitioner argued below that the testimony of Mark Conta, the government's use-of-force expert, also should have been excluded under *Kastigar* because he had approximately twenty conversations with and heard the testimony of Fred Nichols, another use-of-force expert who was exposed to Sergeant Koon's compelled statement. App. 21a. Although the district court found that Mr. Conta was not exposed to petitioner's statement, this finding is subject to serious question on remand if the D.C. Circuit's standard applies because Mr. Nichols' testimony was excluded after he "testified that his testimony would be affected by . . . [his] exposure" to Sergeant Koon's statement, *id.*, and thus Mr. Conta's testimony may also have been "indirectly" "shaped, altered, or affected" by petitioner's statement as a result of his numerous contacts with Mr. Nichols.

C. The Decision Below Conflicts With Decisions Of Other Circuits And Of This Court As To The Appropriate Definitions Of Unlawful Force And Custody Under The Fourteenth Amendment.

Petitioner was charged with violating Mr. King's Fourteenth Amendment substantive due process rights while Mr. King was in official custody. App. 47a. Yet, over petitioner's objection, the district court instructed the jury with respect to the charge against Sergeant Koon using the Fourth Amendment definitions of "unlawful force" and "custody," instead of definitions based upon the Fourteenth Amendment that were proffered by defendant. The district court's instructions, which were affirmed by the court of appeals as correct statements of the law, are inconsistent with decisions of other circuits and this Court.

The district court relied on *Graham* v. *Connor*, 490 U.S. 386 (1989), involving a Fourth Amendment violation, to instruct the jury, over petitioner's objection, that the use of force is illegal if it is "objectively unreasonable," *id.* at 397. *See* App. 47a. However, the Court in *Graham* did not hold that the objective reasonableness standard was applicable to violations of substantive due process. Indeed, the *Graham* Court described a narrower definition of unlawful force under the Due Process Clause: "excessive force that amounts to punishment." *Id.* at 395 n.10 (citing *Bell* v. *Wolfish*, 441 U.S. 520, 535-39 (1979)).

In *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991), which (like the present case) involved a 18 U.S.C. § 242 prosecution, the Fourth Circuit approved a jury instruction defining unlawful force for substantive due process violations as force applied "maliciously or sadistically for the very purpose of causing harm." *Id* at 787-88. The Fourth Circuit recognized that this instruction, based on *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), "adequately conveyed" the law that a substantive due process violation occurs only if the use of force "'shock[s] the conscience'" or is intended as punishment. *Cobb*, 905 F.2d at 789.

The district court rejected petitioner's proffered instructions that were based upon *Cobb*, *Johnson* and *Wolfish*, and the court below affirmed. Relying on *United States* v. *Reese*, 2 F.3d 870 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994), the court of appeals determined that the Fourth Amendment "objective reasonableness" standard should apply, even though petitioner was charged only with violating Mr. King's substantive due process rights and not his Fourth Amendment rights. App. 47a-48a. The court below thus determined that Sergeant Koon could be found to have violated Mr. King's substantive due process rights even if neither he nor the other officers applied force that rose to the level of being "shocking to the conscience." App. 49a. The court of appeals interpreted substantive due process to encompass not only the narrow right to be free from "excessive force that amounts to punishment," *Graham*, 490 U.S. at 395 n.10, but also the "broader right" simply "to be protected from *harm*." *Id.* (emphasis in original).

The court of appeals' expansion of substantive due process in this fashion is at odds not only with this Court's approach to this area of the law, but with the law in other circuits as well. Indeed, the court below interpreted substantive due process so broadly that, as it candidly acknowledged, state actors can violate substantive due process based upon "no more than" failing to protect a person in custody from "a common-law crime or tort" committed by others. Yet the court of appeals failed to explain how its expansive view of substantive due process could be justified under this Court's precedents.

The court below also adopted a more expansive definition of "official custody" than recognized in this Court's substantive due process cases. The district court instructed the jury with a definition taken from Fourth Amendment cases—"a person is in official custody if, 'in light of all circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave,'" App. 51a—and rejected petitioner's proposed instruction that would have defined official custody to have occurred only after the alleged victim is "taken to 'a police facility or other pretrial detention facility.'" *Id.* Although the court below summarily dismissed petitioner's

proposed definition of official custody as "logically fallacious," *id.*, the court failed to explain how its expansive interpretation of substantive due process was in accordance with this Court's precedents.

The court below substantially broadened the definitions of unlawful force and custody under substantive due process to be the same as the Fourth Amendment standard, apparently to salvage an indictment that did not charge petitioner with violating Mr. King's Fourth Amendment rights. The resulting inconsistency among the circuits regarding the substantive due process standards for application of force calls for corrective action by this Court.

D. In Light Of The Extraordinary Circumstances Of This Case, The Court Should Reexamine the Dual Sovereignty Doctrine And Address Whether The Successive Prosecutions Of Petitioner Violated The Double Jeopardy Clause Of The Fifth Amendment Or The Due Process Clauses Of The Fifth And Fourteenth Amendments.

Applying the "dual sovereignty doctrine," this Court has held that successive state and federal prosecutions do not implicate double jeopardy or related due process concerns. *See, e.g., Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922); *cf. Heath* v. *Alabama*, 474 U.S. 82 (1985) (successive prosecutions by different states do not violate double jeopardy). The prosecution of petitioner after his acquittal in state court, however, is an egregious and impermissible extension of that doctrine and calls into question whether it should be reconsidered and more narrowly articulated, if not reversed.[11]

---

[11] *See, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Ronald J. Allen, *Freedom From Double Jeopardy, Our Lost Liberty*, WALL ST. J., Mar. 17, 1993, at A15; Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994);

[Footnote continued on next page]

See United States v. *Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[A] reexamination of *Bartkus* may be in order, since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states."); *Turley* v. *Wyrick*, 554 F.2d 840, 842-43 (8th Cir. 1977) (Lay, J., concurring), *cert. denied*, 434 U.S. 1033 (1978). A large body of scholarship in this area has "virtually uniformly argued against the dual sovereignty theory the Court has forged, advocating its abolition or at least limitation." Herman, *supra* note 11, at 618 n.32.[12]

[Footnote continued from previous page]

Paul Hoffman, *Double Jeopardy Wars: The Case For a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994); Paul Craig Roberts, *Justice Takes A Double Jeopardy Hit*, WASH. TIMES, May 3, 1993, at E3; Stuart Taylor Jr., *Repeat Offenses*, AM. LAWYER, Sept. 9, 1992, at 8; Bruce J. Terris, *Corruption of Justice in L.A.*, LEGAL TIMES, Apr. 26, 1993, at 22.

[12] *See, e.g.*, Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Walter L. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Harlan H. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia* v. *San Antonio Metropolitan Transit Authority*, 22 NEW. ENG. L. REV. 31 (1987); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 426 (1986); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus* v. *Illinois and Abbate* v. *United States*, 14 CASE W. RES. L. REV. 700 (1963); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992); Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979).

The unfairness of the dual sovereignty doctrine is heightened in this case because state and federal prosecutors may have agreed that the state prosecution should proceed first, rather than vice versa, in order to avoid the double jeopardy bar of the California Constitution, which does not recognize the dual sovereignty doctrine. *See* Cal. Const., art. I, § 15; *see also* Cal. Penal Code §§ 656, 793-794 (West 1988); *People* v. *Comingore*, 570 P.2d 723 (Cal. 1977). Thus, by refraining from prosecuting petitioner until after the state trial, the federal government insured that prosecutors would have a second opportunity to convict Sergeant Koon in the event that the first prosecution did not succeed.

Petitioner acknowledges that the Court has recently rearticulated its adherence to the dual sovereignty doctrine. *See Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947 n.22 (1994). Petitioner nonetheless respectfully submits that the question of the validity of that doctrine—in light of the extraordinary circumstances of this case—warrants the attention of this Court.[13] For several reasons, the Court should

[13] Petitioner argued in the district court and the court of appeals that his double jeopardy and due process rights were violated on the grounds that there was sufficient federal and state collusion during the two prosecutions to fit within the "*Bartkus* exception" to the dual sovereignty doctrine. App. 29a-32a. In *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), the Court suggested an exception to the dual sovereignty principle if the second prosecution was "merely a tool" of or "a sham and a cover for" prosecutors from the first action to "avoid[] the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal." 359 U.S. at 122-23. In these circumstances, a court might conclude that the two prosecutions were "in essential fact" brought by the same sovereign. *Id.* at 122.

Although petitioner did not argue directly below that the dual sovereignty doctrine should be reversed or modified, both the district court and court of appeals noted their adherence to the dual sovereignty doctrine in this case. App. 68a-69a, 130a. Thus, the dual sovereignty question was preserved for this Court's review. *See Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991) (if "court below passed on the issue," it is preserved even if not argued below).

Even if the court below had not addressed the dual sovereignty issue, this Court would have the authority to consider the issue. *See, e.g., Stanley* v.

[Footnote continued on next page]

consider whether the Double Jeopardy Clause, as well as the Due Process Clause, preclude the successive state and federal prosecutions of petitioner in this case.

First, the text of the Double Jeopardy Clause plainly does not compel the conclusion that a federal prosecution of a defendant's conduct is permitted after a state court has acquitted the defendant of charges based upon the same conduct. The Double Jeopardy Clause commands in unequivocal terms that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This provision "on its face carries no exception for different sovereignties." Herman, *supra* note 11, at 625; *see also* Amar & Marcus, *supra* note 11, at 1 ("At first blush, the federal civil rights trial of four Los Angeles police officers, following their acquittals in state court prosecutions, might seem a patent double jeopardy violation.").

Second, the history of the English common law calls into serious question whether the Framers intended—at least in the

[Footnote continued from previous page]

Illinois, 405 U.S. 645, 658 & n.10 (1972) (although precise issue was not raised below, it could be considered in this Court because it involved the same "constitutional premise raised below" and "a method of analysis [was] readily available to the state court"); *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them"); *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."); *see also Blonder-Tongue Laboratories, Inv.* v. *University of Illinois Foundation*, 402 U.S. 313 320 n.6 (1971); *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980). This Court's review of the dual sovereignty issue is appropriate particularly because it would have been futile to argue before the courts below that it should disregard long-standing dual sovereignty precedents of this Court that the courts below were bound to follow. *Cf. Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 66, 68-69 (1938) (even though parties had not argued below the issue of whether to reverse *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), the Court determined that it properly could consider that issue).

context of federal reprosecution following acquittal in state court—for the doctrine of dual sovereignty to be incorporated in the Double Jeopardy Clause or the Due Process Clause of the Fifth Amendment, or whether the drafters of the Fourteenth Amendment intended for this doctrine to apply in circumstances such those presented in this case. Scholarship in this area has *unanimously* concluded that "[a]t the time of both the Founding and the Reconstruction, English common law double jeopardy principles barred an English prosecution if the defendant had already been tried by a foreign government." Amar & Marcus, *supra* note 11, at 6.[14]

Third, this Court's rejection of the dual sovereignty doctrine in other areas of constitutional law has called into serious question the application of this doctrine to the Double Jeopardy Clause. The Court long ago overruled earlier decisions holding that the Self-Incrimination Clause of the Fifth Amendment did not preclude the federal government from relying on statements coerced by a state government (*Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)) as well as decisions holding that the Fourth Amendment did not preclude the federal government from relying on evidence obtained through an illegal search and seizure by a state government (*see Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960)). Yet, as commentators have recently observed,

> while the Court eventually recognized that the . . . dual sovereignty doctrine was no longer defensible in the realms of unreasonable searches and compelled self-incriminations, it has thus far refused to dismantle the doctrine as applied to double jeopardy. This apparent doctrinal inconsistency merits close study.

Amar & Marcus, *supra* note 11, at 11-12.

---

[14] *See also* Cassell, *supra* note 11, at 710 ("At the time the Framers adopted the Bill of Rights, it appears that the English precedents allowed a defendant acquitted in one court of competent jurisdiction to raise a defense of *autrefois acquit* ('formerly acquitted') to subsequent criminal charges in another court."); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1, 8 (1956) ("The common law doctrine that an acquittal or conviction by a court of competent jurisdiction is a bar to a prosecution for the same offense in England has been definitely settled by three clearcut decisions rendered prior to the American revolution.").

Fourth, even if this Court left the holdings of its earlier Double Jeopardy cases undisturbed, those holdings would not require that the dual sovereignty doctrine be applied to the facts of petitioner's case. As one commentator has observed, "the reprosecution of . . . Sergeant Stacey Koon fell within a potential exception to the dual sovereignty [doctrine]: The Supreme Court has never held that reprosecution following an acquittal is permissible under the Double Jeopardy Clause." Herman, *supra* note 11, at 610 (footnote omitted). Although in *Bartkus*, the Court held that a *state* prosecution following acquittal in federal court was not precluded by due process, that case was decided before the Double Jeopardy Clause was applied to the States through the Due Process Clause of the Fourteenth Amendment. *Id.* at 641. And, in all other cases decided by this court under the Double Jeopardy Clause, the defendant had not been acquitted in the earlier proceeding. *See Heath*, 474 U.S. 82 (Alabama death sentence upheld for defendant who pleaded guilty in Georgia for same murder); *Lanza*, 260 U.S. 377 (federal conviction upheld for defendant who was convicted in state court based upon same underlying conduct).

Finally, application of the Double Jeopardy Clause here is proper even though the elements of the federal charges against petitioner are not completely identical to those of the state charges on which he was acquitted. The critical point is that petitioner was subject to criminal prosecution a second time after he was *acquitted* in another prosecution in which the jury necessarily decided in petitioner's favor a factual question—"whether . . . [the defendants] willfully used unreasonable force." App. 14a. That was the "ultimate issue," *id.*, in the second prosecution. In rejecting petitioner's argument to exclude Officer Briseno's videotaped state trial testimony on Confrontation Clause grounds, the court below emphasized that "[t]he operative facts and legal issues in the state and federal trials were substantially similar," App. 8a, and that "there is no

suggestion that . . . the factual nature of the case . . . changed at all from the first to the second trial," App. 9a. Thus, the admission of Officer Briseno's videotaped state testimony necessarily established that the key factual issues were the same in both trials. Indeed, it is ironic that the prosecutor may rely on the identicality of the two prosecutions may be used by the prosecutor to circumvent petitioner's rights under the Confrontation Clause, but ignore the consequences of that indenticality under the Double Jeopardy Clause.

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court recognized that collateral estoppel principles implicit in the Double Jeopardy Clause may preclude reprosecution in circumstances analogous to this case. In *Ashe*, the Court held that a state could not retry a defendant for robbery of a player in a poker game after the defendant had been acquitted of robbing another of the poker players. The Court reached this conclusion notwithstanding the fact that the elements of the second prosecution were necessarily different from those of the first because the victims were not identical. The Court reasoned that the jury must have decided in defendant's favor on a factual issue essential to both prosecutions (namely, whether the defendant was one of the masked men who committed the robbery), and thus the government was not allowed to litigate that issue again. Those same constitutional collateral estoppel principles should preclude reprosecution of petitioner because factual issues underlying both the state and federal prosecution were necessarily decided in petitioner's favor during the state trial.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

April 10, 1994

Respectfully submitted,

JOEL LEVINE
16000 Ventura Blvd.
Suite 500
Encino, CA 91436
(818) 955-6052

IRA SALZMAN
600 South Lake Avenue
Suite 410
Pasadena, CA 91106
(818) 578-0043

* THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
JOHN K. BUSH
JONATHAN K. TYCKO
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
**Counsel of Record*